

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICK M. LATTA
Claimant

VS.

CONTINENTAL AIRLINES CORP
Respondent

AND

NATIONAL UNION FIRE INS CO
Insurance Carrier

AND

WORKERS COMPENSATION FUND

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Docket No. 189,201

ORDER

The respondent, its insurance carrier, and the Workers Compensation Fund request a review of the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on May 24, 1995. The Appeals Board heard oral argument in Wichita, Kansas, on October 11, 1995.

Appearances

Claimant appeared by his attorney, Vincent A. Burnett of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton Andersen of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

Record & Stipulations

The Appeals Board has considered the record and adopted the stipulations listed in the Award of May 24, 1995.

ISSUES

The Special Administrative Law Judge found claimant sustained injuries to his right wrist and right shoulder that caused a six percent (6%) functional impairment to the body as a whole, and caused a thirty-two percent (32%) work disability once claimant was laid off from respondent's employ. In addition, the Special Administrative Law Judge assessed fifty percent (50%) of the liability against the Workers Compensation Fund. The respondent and insurance carrier requested this review and contend the Judge erred in the determination of:

- (1) Average weekly wage;
- (2) Nature and extent of disability; and
- (3) The liability of the Workers Compensation Fund.

The Workers Compensation Fund also requested review of the finding of Fund liability. Those are the issues now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be modified to increase claimant's work disability to forty percent (40%) and to assess the entire liability of this award against the respondent and its insurance carrier.

Claimant fractured his right wrist on July 29, 1992, when he was pulling on a cargo strap and it broke, causing claimant to fall. Claimant immediately sought medical treatment and was casted. While recovering from the wrist fracture, in September 1992 claimant began to experience pain in his right shoulder. Despite his injuries, claimant continued to work for the respondent until February 15, 1994, when it closed its Wichita operations and terminated claimant.

1) The respondent and insurance carrier contend the Special Administrative Law Judge erred in computing claimant's average weekly wage. The heart of respondent's argument lies in the contention that claimant failed to satisfactorily prove the value of certain additional compensation items. Because it failed to provide any evidence of the value of fringe benefits, claimant provided his opinions regarding the weekly value of certain additional compensation items. Those opinions are not so untrustworthy as to be disregarded. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Although claimant has the burden of proving every element of his claim, once claimant presented evidence of the value of the additional compensation items he received while working for the respondent, the burden of going forward with the evidence shifted to the respondent to controvert that testimony. Because of respondent's failure to provide information of the value of claimant's additional compensation items, the Appeals Board will utilize those amounts provided by claimant.

The Appeals Board finds claimant's average weekly wage is \$659.63 which is comprised of \$482.00 per week regular time and \$177.63 per week for additional compensation items. On the date of accident, claimant was earning \$12.05 per hour and received, among others, the following compensation items: a cafeteria benefit plan, 401K benefit plan, health and accident insurance, dental and vision insurance, life and long-term disability insurance, and shift differential

pay. The Special Administrative Law Judge found an average weekly wage of \$527.20 but used the improper base rate of \$13.18 which claimant was earning on his last day of work rather than the rate he was earning on the date of accident. See K.S.A. 1992 Supp. 44-511.

(2) The respondent and insurance carrier contend the Special Administrative Law Judge erred in finding that claimant has proven a work disability for the period after claimant was laid off. They contend claimant is entitled to permanent partial disability benefits based upon functional impairment only because respondent offered to transfer and employ claimant in a different region of the country and claimant could, therefore, remain in respondent's employ and earn a comparable wage. Because of this offer of transfer, the respondent and insurance carrier contend the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), should apply and limit claimant's benefits to those based on functional impairment.

The Appeals Board disagrees. Claimant testified he was asked if he desired to transfer to a different region of the United States to work for the respondent. There was no representation how long the job would last if claimant chose to accept that transfer. However, he would have been required to move and uproot his school children and wife who was employed in the Wichita area. Rather than uprooting his family, claimant declined the transfer, was laid off, and sought and obtained other employment in the Wichita area. Claimant presently works for Federal Express. The rationale of Foulk v. Colonial Terrace, *supra*, does not apply because claimant was justified in declining to accept employment outside the area that would normally be considered his labor market. As indicated in Scharfe v. Kansas State Univ., 18 Kan. App. 2d 103, 848 P.2d 994, rev. denied 252 Kan. 1093 (1992), the open labor market must be reasonably accessible and individuals are not required to move their residences or travel unreasonable distances to obtain employment. Therefore, the facts of this proceeding make the Foulk case distinguishable.

Based upon the above, the Appeals Board finds claimant is entitled to permanent partial disability benefits based upon his functional impairment rating during the period he continued to work for the respondent before his layoff on February 15, 1994. During this period of employment, claimant earned a wage comparable to what he was earning on the date of accident, and, therefore, the presumption of no work disability as contained in K.S.A. 1992 Supp. 44-510e is applicable. The statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The parties stipulated that claimant's functional impairment for injuries to the right wrist and right shoulder constitutes a twelve percent (12%) impairment to the body as a whole. For the period preceding layoff, claimant's benefits are to be based upon an average weekly wage, excluding additional compensation items, of \$482.00. Additional compensation items are not to

be included in the computation of average weekly wage until they are discontinued. See K.S.A. 44-511(a)(2).

For the period after February 15, 1994, the Appeals Board finds the presumption of no work disability is overcome and claimant is entitled to permanent partial disability benefits based upon a forty percent (40%) work disability. The Appeals Board adopts the finding of the Special Administrative Law Judge that claimant has sustained a thirty percent (30%) loss of his ability to perform work in the open labor market. This finding is based on the opinions of both parties' labor market experts. James Molski testified that based on the permanent restrictions provided by claimant's treating physician, Miguel Pirela-Cruz, M.D., claimant has a thirty to thirty-five percent (30-35%) loss of ability to perform work in the open labor market. Karen Crist Terrill, on the other hand, testified claimant has a loss of twenty-five to thirty percent (25-30%) based on those same restrictions.

The Appeals Board finds claimant has a fifty percent (50%) loss of his ability to earn a comparable wage. This finding is based upon the difference between claimant's present ability to earn a weekly wage in the neighborhood of \$322.80 and the average weekly wage he was earning on the date of accident, or \$659.63. At the time of regular hearing, claimant was working part-time for Federal Express earning \$8.07 per hour. The Appeals Board finds that hourly rate is indicative of claimant's ability to earn wages in the open labor market and, therefore, claimant retains the ability to earn approximately \$322.80 per week.

After considering claimant's loss of ability to perform work in the open labor market and his loss of ability to earn a comparable wage, the Appeals Board finds claimant has sustained a forty percent (40%) work disability. The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, there appears no compelling reason to give either factor greater weight and, accordingly, they will be weighed equally. The result is an average between the thirty percent (30%) loss of ability to perform work in the open labor market and the fifty percent (50%) loss of ability to earn a comparable wage resulting in a forty percent (40%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

(3) The Appeals Board finds claimant's right shoulder condition is the direct and natural result of the right wrist injury as it developed as a result of immobilizing the right arm. Although the right shoulder injury is compensable as a natural consequence of the right wrist injury, it does not constitute a subsequent work-related injury. Therefore, the Workers Compensation Fund bears no responsibility for the benefits payable in this proceeding. The Appeals Board bases these findings upon the testimony of claimant's treating physician, Dr. Pirela-Cruz, who testified claimant's right shoulder problem was caused by immobilization of the right shoulder and arm. Respondent presented the testimony of Ernest R. Schlachter, M.D., who testified claimant's right shoulder injury would not have occurred if he would not have altered his work habits when he was casted. Because it appears the right shoulder problems began after claimant's cast was removed and because Dr. Schlachter also testified the adhesive capsulitis in the shoulder joint was caused by immobilization, the Appeals Board finds it is more probably true than not that immobilization, rather than claimant's work, resulted in the right shoulder condition.

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, totally or partially, of Workers Compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976). Liability should only be assessed against the Workers Compensation Fund when an employee sustains a subsequent work-related accident. Because these conditions would have occurred regardless of whether respondent retained the employee in its employ, the Workers Compensation Fund is not responsible for the natural and probable consequences or progression of an earlier injury, unless it somehow constitutes a subsequent work-related accident, which in this instance it did not.

The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge that are not inconsistent with specific findings made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on May 24, 1995, should be, and hereby is, modified, as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Patrick M. Latta and against the respondent, Continental Airlines Corporation, and the insurance carrier, National Union Fire Insurance Company of New York, and the Kansas Workers Compensation Fund for an accidental injury which occurred on July 29, 1992, for 80.86 weeks of compensation at the rate of \$38.56 per week in the sum of \$3,117.96, based on an average weekly wage of \$482.00, for a 12% permanent partial general disability and 334.14 weeks of compensation at the rate of \$175.91 per week in the sum of \$58,778.57 based on an average weekly wage of \$659.63 for a 40% permanent partial general disability making a total award of \$61,896.53.

As of October 27, 1995, there is due and owing claimant 80.86 weeks of temporary total compensation at the rate of \$38.56 per week in the sum of \$3,117.96, and 88.43 weeks of permanent partial compensation at the rate of \$175.91 per week in the sum of \$15,555.72, making a total due and owing of \$18,673.68. The remaining balance of \$43,222.85 is to be paid for 245.71 weeks at the rate of \$175.91 per week, until fully paid or further order of the Director.

All compensation, medical expenses and administrative costs are to be borne entirely by the respondent and its insurance carrier.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed entirely to the respondent and its insurance carrier to be directly paid as follows:

William F. Morrissey

Special Administrative Law Judge	\$150.00
Deposition Services	
Transcript of Regular Hearing	\$367.30
Deposition of Karen Crist Terrill	\$133.60
Deposition of Ernest R. Schlachter, M.D.	\$247.00
Kelley, York & Associates	
Deposition of Miguel Pirela-Cruz, M.D.	\$330.85
Deposition of James T. Molski (1-4-95)	\$327.01
Deposition of James T. Molski (2-20-95)	\$131.30

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vincent A. Burnett, Wichita, Kansas
Anton Andersen, Kansas City, Kansas
Randall C. Henry, Hutchinson, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director

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Docket No. 189,201

ORDER

Claimant requested review of the Order of Administrative Law Judge John D. Clark entered in this proceeding on June 1, 1995. The Appeals Board heard oral argument in Wichita, Kansas, on October 11, 1995.

Appearances

Claimant appeared by his attorney, Vincent A. Burnett of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen McManus of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

Record

The Appeals Board has reviewed the record submitted to the Administrative Law Judge to decide this proceeding, along with the file prepared by the Division of Workers Compensation regarding this case.

ISSUES

The Administrative Law Judge denied claimant's request for interest under the provisions of K.S.A. 1992 Supp. 44-512b. Claimant requested review of that Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

Before this case was submitted to the Administrative Law Judge for decision, the parties stipulated claimant had sustained a twelve percent (12%) permanent partial impairment of function to the body as a whole as a result of injuries he had sustained while working for the respondent. Despite the fact claimant was requesting an award of permanent partial general disability benefits based upon work disability and despite the fact the parties were unable to stipulate to an average weekly wage, claimant contends the respondent and its insurance carrier should have commenced payment of benefits prior to issuance of the award by the Administrative Law Judge based upon the twelve percent (12%) functional impairment rating. Because respondent and its insurance carrier did not, claimant contends they owe interest under the provisions of K.S.A. 1992 Supp. 44-512b. Without explanation, the Administrative Law Judge denied claimant's request.

K.S.A. 1992 Supp. 44-512b provides as follows:

“(a) Whenever the administrative law judge, director or court finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.”

Based upon a review of the record, the Appeals Board finds that the Order of the Administrative Law Judge should be affirmed. Although it is true claimant would be entitled to permanent partial disability benefits based upon either the twelve percent (12%) functional impairment rating or a work disability greater than twelve percent (12%), the amount of compensation due could not be determined prior to the award because of the issue pertaining to average weekly wage. Therefore, the Appeals Board is unable to find that there was not just cause to pay claimant compensation prior to the Award.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark entered in this proceeding on June 1, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vincent A. Burnett, Wichita, Kansas
Stephen McManus, Kansas City, Kansas
Randall C. Henry, Hutchinson, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

